

International Brotherhood of Electrical Workers, Local Union No. 363, AFL-CIO and U.S. Information Systems, Inc. and Communication Workers of America, Local 1106. Case 34-CD-57

September 30, 1998

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The charge in this Section 10(k) proceeding was filed April 16, 1998, by the Employer, U.S. Information Systems, Inc. (USIS), alleging that the Respondent, Electrical Workers IBEW, Local 363 (Local 363), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing USIS to assign certain work to employees it represents rather than to employees represented by Communication Workers, Local 1106 (Local 1106). The hearing was held May 18 and 27, 1998, before Hearing Officer Terri A. Craig.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

USIS is a New York Corporation, engaged at its facility in West Nyack, New York, in the business of non-retail sale and installation of low-voltage cabling for such applications as voice and data networks and security installations. During the 12 months preceding the hearing, USIS purchased goods and materials valued in excess of \$50,000 from points located outside the State of New York. The parties stipulate, and we find, that USIS is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 363 and Local 1106 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Don Pablo's Mexican Kitchen (Don Pablo's), the site of the work in dispute, is a restaurant which on July 24, 1997, leased space in the Palisades Center Mall (the Mall) under the name Don Pablo's Operating Co. from the Mall owner, EklecCo. On January 14, 1998, Don Pablo's entered into an agreement with Westwood Contractors, Inc. to construct the interior portion of its leased restaurant space. On March 25, 1998, Don Pablo's entered into a separate contract with USIS to install a fire and burglar alarm system. USIS has a collective-bargaining agreement with Local 1106 which represents the employees employed at the jobsite. USIS does not have a contract with Local 363.

Effective November 15, 1996, Palisades Construction Management Co. Inc., an agent of EklecCo, serving as

project construction manager, together with various construction unions entered into a project labor agreement (the PLA.) The PLA requires adherence to the payment of certain prevailing wage rates, benefits, manning requirements, work disruption prohibitions, and dispute resolution mechanisms in performing construction work in the Mall. Both Don Pablo's and Westwood Construction have a signature page in the PLA indicating that all work covered by the PLA shall be performed under and pursuant to the terms of the PLA. Local 363 is also signatory to the PLA, but neither USIS nor Local 1106 are signatory or agreed to abide by it.

On April 13, 1998, USIS began installing the burglar and fire alarm system in the interior portion of Don Pablo's space, utilizing five to six technicians represented by Local 1106 to perform the work. On April 15, 1998, James Bodrato, executive officer and shop steward for Local 363, approached Frank Greenberg, USIS' project manager, and Thomas Carino Sr., Local 1106's shop steward, just outside Don Pablo's leased space located on the fourth floor of the mall. Greenberg and Carino both assert that Bodrato accused USIS of stealing Local 363 work by assigning it to Local 1106 members. After "pushing" Greenberg and screaming at him, Bodrato told Greenberg that he was going to throw him off the fourth floor atrium. Bodrato then turned to Carino and said "all you do is steal my f-cking work . . . how about I take you by that tie and throw you off this f-cking atrium?" Bodrato then said to Carino that when it comes to taking out people, he, Carino, would be the first to be taken out. After the incident with Bodrato occurred, Greenberg and Carino reported it to the police. Two temporary Orders of Protection issued on April 20, 1998, ordering Bodrato not to communicate with either Greenberg or Carino and to stay 100 feet away from them.

Local 363 instituted grievance-and-arbitration proceedings under the PLA against Don Pablo's and Westwood for assigning work to USIS, without requiring USIS' compliance with the PLA. On May 7, 1998, an arbitration hearing was held. The arbitrator issued a final award on May 15, 1998, finding that the work being performed by USIS was "project work" under the scope of the PLA and providing that "[Don Pablo's] and Westwood shall cease and desist from violating the PLA by permitting Project Work to be performed at Don Pablo's Mexican Kitchen without complying with the PLA."

B. Work in Dispute

The disputed work involves the assignment of cabling and device installation for a fire and burglar alarm system at Don Pablo's Mexican Kitchen located in the Palisades Center Mall in West Nyack, New York.

C. Contentions of the Parties

Local 363 contends that no jurisdictional dispute exists and that the notice of hearing should be quashed because there are no competing claims for the work and no pro-

scribed activity took place. Additionally, Local 363 claims that the work at issue is governed by the PLA, which contains a specific provision outlining a procedure for dealing with contractual work disputes. Local 363 asserts, however, that if it were determined that there is reasonable cause to believe that an alleged violation of Section 8(b)(4)(D) of the Act occurred, the factors which traditionally determine work assignments under 10(k) of the Act, including Employer preference and past practice, would favor assignment of the work to Local 363. Local 363 claims that Don Pablo's constitutes the true Employer for the purpose of work allocation, and that Don Pablo's made Local 363 its implicit choice by acknowledging the PLA in its lease with EklecCo.

USIS takes the position that Local 363's contention that the dispute is a contractual and not a jurisdictional one is factually and legally without merit. USIS contends there is reasonable cause to believe that Local 363 violated Section 8(b)(4)(D). USIS asserts that by engaging in threats and acts of physical violence toward representatives of USIS, Local 363 made a claim to the work in dispute and used proscribed means to enforce it, attempting to coerce USIS into assigning the work to members of Local 363 instead of USIS' own Local 1106-represented employees. USIS also maintains that since it is not signatory to the PLA, the PLA does not constitute an agreed-on method binding on all parties for the voluntary adjustment of the dispute. Further, USIS claims that under the rationale of *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938 (1989), USIS is the proper employer for purposes of the 10(k) proceeding and that the majority of factors considered by the Board in making jurisdictional awards favor an award of the disputed work to USIS' Local 1106-represented employees.

D. Applicability of the Statute

It is well settled that the standard in a 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. It requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claims to the work in dispute, that there are competing claims to the disputed work between rival groups of employees, and that no method for the voluntary adjustment of the dispute has been agreed on. Each aspect of the standard is at issue here.

With respect to the use of proscribed means to enforce Local 363's claim to the disputed work, there is evidence that James Bodrato, executive officer and shop steward for Local 363, accused USIS' project manager, Greenberg, and Local 1106 Shop Steward Carino of stealing Local 363's work. Bodrato also pushed Greenberg and told both Greenberg and Carino that he was going to throw them off the fourth floor balcony above the atrium. Bodrato's statements constitute a threat of prohibited activity.

Local 363 contends that Bodrato did not make threats and that the alleged incident was only a quick exchange of the type which frequently occurs between members of different trades on a construction site. Such conflicting versions of the event, however, do not prevent the Board from proceeding under Section 10(k). The Board need not rule on the credibility of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated. *Laborers Local 320 (Northwest Metal Fab & Pipe)*, 318 NLRB 917, 918 (1995).

As to whether there are competing claims to the disputed work, Local 363 contends that it has not made a claim for the work. Instead, it has only pursued contractual arbitration against Don Pablo's for violating the PLA by permitting USIS to perform project work without complying with the PLA. Local 363 argues that its pursuit of arbitration does not constitute a competing claim for disputed work under the rationale of *Laborers International Union (Capitol Drilling Supplies)*, 318 NLRB 809 (1995). We find no merit in this contention.

In *Capitol Drilling*, the Board held that in the construction industry, a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or a court action, does not constitute a claim to the subcontractor for the work.¹ The Board distinguished, however, those cases where the union does more than peacefully pursue a contractual grievance against a general contractor. Thus, the Board noted that a true jurisdictional dispute arises when a union seeking enforcement of a contractual claim not only pursues its contractual remedies against the employer with which it has the agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work. In such circumstances, the Board stated it would find truly competing claims and the use of threat or coercion to enforce a claim by the representative of either group of employees would be sufficient to trigger a 8(b)(4)(D) allegation and consequent 10(k) proceeding. *Capitol Drilling*, 318 NLRB at 811-812.

This case involves the true jurisdictional dispute which the Board distinguished from the facts in *Capitol Drilling*. Local 363 did not confine its action to a peaceful pursuit of the contractual claim against Don Pablo's. Instead, Local 363's representative, Bodrato, approached the subcontractor, USIS, directly and informed its representative, Greenberg, and Local 1106's representative, Carino, that they were "stealing" Local 363's work. Local 363 thereby made a clear and direct claim to the subcontractor for the disputed work. Further, Local 363, through Bodrato, used a threat of physical harm to Greenberg and Carino to attempt to enforce the claim. In

¹ Member Hurtgen does not pass on the validity of the Board's decision in *Capitol Drilling*.

these circumstances, we find that there are competing claims for the disputed work.

Finally, the record indicates that no method for the voluntary adjustment of the dispute has been agreed on by all parties. The PLA contains a specific provision outlining a procedure for dealing with jurisdictional work disputes. Local 363, which is a signatory to the PLA, pursued its claim against Don Pablo's under the PLA. However, USIS is deemed to be the employer for purposes of determining the jurisdictional dispute² and USIS is not signatory to the PLA. Nor is Local 1106, the Union representing USIS' employees. Accordingly, there is no agreed-on method for voluntary adjustment of the dispute.

Having found reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

To the extent that Local 363 argues that the PLA to which it and Don Pablo's are parties controls the award of the disputed work, *Austin Co.*, supra, indicates that such an agreement is not applicable because the employer for the purpose of assigning the work in dispute, USIS, is undisputedly not party to the PLA. There is no separate collective-bargaining agreement between USIS and Local 363. USIS, however, is party to a collective-bargaining agreement with Local 1106 specifically covering the work in dispute. Therefore, this factor favors an award to the group of employees represented by Local 1106.

2. Employer preference and past practice

Frank Greenberg, project manager for USIS, stated that USIS preferred having the work in dispute awarded to employees represented by Local 1106. Greenberg also stated that USIS' past practice is to assign fire and burglar alarm work to Local 1106-represented employees and that USIS has not employed any employees who were subject to a Local 363 collective-bargaining agree-

ment to perform the type of work in dispute. Accordingly, this factor favors an award of the disputed work to employees represented by the Local 1106.

3. Area and industry practice

Greenberg testified that the predominant number of alarm installing companies locally and nationwide are nonunion. Local 363 business manager, Joseph Maraia, and assistant business manager, John Maraia, testified that in the Mall, alarm work has been done almost exclusively by Local 363-referred employees. Both Joseph and John Maraia put the sum total at approximately 200,000 hours of alarm work. Their testimony is limited to alarm work at the Mall and does not address area or industrywide practice. This factor, therefore, does not favor awarding the work in dispute to either group of employees.

4. Relative skills and training

The record shows that USIS' Local 1106-represented employees receive specific training on the systems USIS handles and spend 100 percent of their time on low voltage work like that being performed at Don Pablo's. The record also shows that New York state alarm licensing law automatically exempts master electricians from licensing requirements. The record, therefore, suggests that electricians' training and experience, such as that received by Local 363 workers, are sufficiently extensive to make additional schooling unnecessary for the performance of alarm work. Thus, the record indicates that employees represented by both unions have the skills and training necessary to perform the work in question. This factor, therefore, does not favor an award to either group of employees.

5. Economy and efficiency of operations

USIS' collective-bargaining agreement with Local 1106 obligates it to assign its regular Local 1106-represented employees not less than 40 hours' work a week. The agreement also prohibits subcontracting of alarm work without the approval of Local 1106. Such subcontracting would be both inefficient and costly for USIS. Thus, assuming that Local 1106 approved the subcontracting of the alarm work, USIS would still be obligated to assign no less than 40 hours of work to its regular Local 1106-represented employees.

Further, Greenberg testified that since the alarm system may require troubleshooting, repair, or expansion, it is more efficient to have USIS' regular work force do the installation since USIS can readily call on those same employees to do the warranty work. Accordingly, the factors of efficiency and economy of operations favor awarding the disputed work to employees represented by Local 1106.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 1106 are entitled to

² See *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 940 (1989) (the company that ultimately controls and makes the job assignment is deemed to be the employer for purposes of the 10(k) proceeding).

perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, and economy and efficiency.

In making this determination, we are awarding the work to the employees represented by Local 1106, not to that Union or its members.

Scope of Award

USIS has requested that the Board issue a broad award assigning the disputed work to its employees represented by Local 1106 for all future work by USIS at the Mall.

Normally, 10(k) awards are limited to the jobsite where the unlawful 8(b)(4)(D) conduct occurred or was threatened. There are two prerequisites for a broader award: (1) there must be evidence that the work in dispute has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) there must be evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. See *Laborers International (Paschen Contractors)*, 270 NLRB 327, 330 (1984), and *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144, 1147–1148 (1980).

Local 363 and Local 1106 have worked simultaneously on at least two other sites in the Mall. The dispute regarding Don Pablo's is the first substantiated instance of controversy arising over the disputed work. Further,

the parties stipulated that for the past 10 years there have been no 8(b)(4)(D) charges or 10(k) hearings involving Local 363, other than the one pertaining to Don Pablo's. Thus, there is no indication in the record that the disputed work has been a continuous source of controversy and will continue to be so. Nor is there evidence that Local 363 is likely to engage in unlawful conduct at future projects in pursuit of work similar to the work in dispute. Accordingly, the award is limited to the controversy at the jobsite that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of USIS represented by Local 1106 are entitled to perform the work of fire and burglar alarm cabling and device installation at Don Pablo's Mexican Kitchen located in the Palisades Center Mall in West Nyack, New York.

2. Local 363 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force USIS to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Electrical Workers IBEW, Local 363, shall notify the Regional Director for Region 34 in writing whether it will refrain from forcing USIS, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.